IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 316 Of 2018

PW.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Bungoma (A.A. Aroni J.) delivered on 3rd November 2016

in

HC Cr. Appeal No. 186 of 2015)

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JUDGMENT OF THE COURT

1. The appellant was charged with defilement of a girl contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 10th day of July 2014 in Bungoma Central District within Bungoma County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of JN, a girl child aged sixteen years old.

2. The appellant was tried and convicted by the magistrate's court. He was sentenced to a term of 20 years' imprisonment. His appeal to the High Court against conviction and sentence was dismissed. He has lodged the instant second appeal to this Court. The grounds of appeal are that the judge erred in failing to scrutinize and evaluate in entirety the evidence on record; the judge made an error of law on the face of the record; the judge erred in failing to find there was no DNA conducted on the appellant and the victim as stipulated in Section 36 (1) of the Sexual Offences Act to verify the truth about the alleged crime; the judge erred in failing to find that the appellant was not taken for any medical examination and this led to a miscarriage of justice; the charge sheet was incurably defective; the judge failed to appreciate that the hymen of a girl aged 16 years and above can be broken by vigorous physical activity; the court failed to appreciate when the complainant (PW 1) testified she was sick and was in her menstruation period and when she was medically examined after 3 days, no positive results was found; the judge failed to find there was no sufficient evidence of penetration; that the medical report does not support the offence of defilement; that the credibility of the medical report is in doubt; that the court relied on speculation and conjecture to convict the appellant and there was no recovery of the alleged pant or bedsheets on which the offence was allegedly committed. The appellant finally stated that the learned judge failed to evaluate and consider the defence testimony.

3. The prosecution relied *inter alia* on the evidence of JN (PW1) and Simon Bwabi Simiyu (PW3). In her testimony, JN (PW1) testified:

> *I am 16 years old. On 10th July 2014 at around 4.00 pm my father called me in the house The accused herein. He is my uncle. I usually call him father. He called me inside the house and ordered me to remove my panty very quickly. He told me if I did not remove my panty he will remove it himself. He then held me and tore my panty. He then pulled me to the bed by force. Then he removed his trouser. He did not have an underwear. He then slept with me. He ordered me to lie on the bed. He then placed his penis into my vagina. He penetrated me. He was having sex with me for about 10 minutes. I started bleeding. I also had a whitish discharge. It looked like mucus. It was oozing out of my private parts. I felt pain when he penetrated his penis into my vagina. He finished, wore his trousers and left……*

4. PW2 TMB testified that the complainant told her the appellant did bad manners to her; that the appellant forced the complainant to sleep with him; he locked the door and forcefully had sex with her; that the appellant had threatened to kill the complainant if she reported anything; that she saw blood in the complainant's panty; she took the complainant to Chwele District Hospital for medical examination and then went to the police station.

5. Simon Bwabi Simiyu PW3 testified that he is a medical doctor at Chwele Hospital; he filled a P3 Form for PW1; that on 16th July 2014, he examined PW1 and on checking her private parts, the hymen was broken and her vaginal canal had blood stains; her clothing was not stained; he made a medical assessment of her age and established she was 16 years old. PW1 did not have any sexually transmitted disease and was HIV negative. PW1 told him she had been sexually assaulted by a person known to her who was HIV positive.

6. In his defence, the appellant gave unsworn evidence. He stated that the charge against him was a fabrication; that the case came about due to disagreement on land with his wife - T PW 2; that it is his wife who fabricated the evidence alleging he had raped the complainant; that he was HIV positive and if he indeed raped PW1, he would have infected her with the disease; the fact the PW1 is HIV negative means he did not have sexual intercourse with her. The appellant submitted that because the complainant was medically examined six days after the alleged incident, the medical report tendered in evidence was unreliable.

7. Upon evaluating the evidence on record, the trial magistrate convicted the appellant. In affirming and upholding the conviction and sentence meted out by the trial magistrate, the learned judge expressed herself as follows:

> *Having considered the evidence on record, I am of the view the prosecution proved its case beyond reasonable doubt. PW1 & 2 struck me as having been truthful in their evidence. Indeed, the trial court ruled out the defence of fabrication in that PW1's evidence was corroborated by that of PW 3 the doctor that there had been penetration and he detected blood stains. This piece of evidence is consistent with what the two stated. Indeed, under the provisions of Section 124 of the Evidence Act the court can base its conviction on the evidence of the victim if the court believes her evidence. The victim further pointed the appellant whom she lived with and considered as a father to be the defiler.*

8. At the hearing of the instant appeal, the appellant appeared in person while the State was represented by Ms Oduor, Principal Prosecution Counsel. Both the appellant and the State filed written submissions.

APPELLANT'S SUBMISSIONS

9. The appellant concentrated his submissions on conviction and sentence. He stated that the sentence of 20-year imprisonment is excessive and harsh given the circumstances of the case; that the investigating officer never visited the scene of crime and he relied on hearsay evidence; that the medical evidence given by PW3 was unreliable as the Doctor failed to examine the appellant; that the evidence of PW 1 was contradictory. Submitting on the defective charge sheet, he asserted that he was wrongfully charged with the offence of defilement instead of incest; that since the complainant stated that the appellant was her father, the proper charge should have been incest and not defilement.

RESPONDENT'S SUBMISSIONS

10. In opposing the instant appeal, the respondent submitted that all the ingredients of the offence of defilement were proved; that there was no dispute as to the identity of the appellant as the person who committed the offence; that the trial magistrate and the learned Judge properly evaluated the evidence on record; that the medical evidence adduced by PW 3 established that the complainant's hymen was broken and her vaginal canal had blood stains. The respondent submitted that the identification of the appellant as the person who committed the offence was proved beyond reasonable doubt; that the age of the complainant was established to be 16 years; that the medical evidence as well as the testimony of PW1 proved there was penetration. It was further submitted that the appellant's defence was considered by both the trial court and the learned judge; that both courts were satisfied that the defence did not dislodge the prosecution case. It was submitted that the appellant was HIV positive and he very well knew he could have infected the complainant with the disease. For this reason, the respondent submitted the sentence meted upon the appellant was neither excessive nor harsh but commensurate with the evidence tendered by the prosecution witnesses.

ANALYSIS and DETERMINATION

11. We have considered the appellant's grounds of appeal, submissions made by both parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the ***Criminal Procedure Code***, *a second appeal is confined to* matters of law. This Court restated as much in ***Karingo -vs- R (1982) KLR 213*** at p. 219;

> *"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"*

12. The appellant was arraigned before the trial court and charged with defilement. In **John Mutua Munyoki - v- Republic [2017] eKLR**, this Court stated that under the Sexual Offences Act the main elements of the offence of defilement are as follows:

> *(i) The victim must be a minor, and*
>
> *(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.*

13. In this appeal, the age of the complainant PW 1 was established to be 16 years. The medical report tendered in evidence by PW3 as to the age of PW1 was uncontroverted. We are satisfied that the complainant was a minor and the appellant was properly charged with the offence of defilement of a girl child 16 years old.

14. A critical aspect in any criminal conviction such as in this appeal, is identification of the appellant as the person who committed the

alleged offence. In this case, PW 1 testified it was the appellant who defiled her. The record shows that the appellant was a person well known to the complainant; the appellant was infact an uncle to the complainant and they lived together. We are satisfied that the evidence on record is one of recognition; the identity of the appellant as the person who committed the alleged offence was proved beyond reasonable doubt.

15. A ground urged in this appeal is whether there is sufficient evidence on record to prove penetration as an ingredient of the offence of defilement. PW1 testified that there was penetration; that she felt pain when the appellant inserted his penis into her vagina. The medical report by PW 3 establish that PW1's hymen was broken and her vagina canal had blood stains. The appellant challenges the credibility of the medical report; he asserts that since he is HIV positive and the complainant is HIV negative, he did not have carnal knowledge of PW1 therefore. We have considered this submission and observe that non-transmission of HIV disease to the victim is not proof that there was no penetration. Transmission of HIV disease or any other disease is not an essential ingredient for the offence of defilement. In **Letto Machaki Mbiti v Republic [2015] eKLR** this Court upheld the view that:

> *"The appellant argued that medical evidence exonerated him since the same established that the appellant was HIV positive while the complainant was HIV negative. We take judicial notice that in certain circumstances the HIV virus is not transmitted from one person to another despite sexual intercourse. We find that the appellant's HIV status did not in any way displace the overwhelming evidence against him."*

16. This was further affirmed in the case of **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)** where the court stated:

> **"…** *[The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."*

17. In this appeal, the appellant has further urged that the charge sheet was defective; that he should have been charged with the offence of incest instead of defilement.

18. In **F O D - v -Republic [2014] eKLR,** it was stated that in order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."* While in the case of incest, the prosecution is *inter alia* required to prove either penetration or an indecent act; In defilement the prosecution is *inter alia* required to prove penetration of a minor. The additional element of the relationship between the accused and the child is what makes the offence incest. Under **section 8(3)** of the ***Sexual Offences Act***, a person found guilty of committing an offence of defilement with a child between the age of twelve and sixteen years is liable upon conviction to imprisonment for a term of not less than twenty years. On the other hand, where a person is found guilty of incest, the minimum sentence prescribed is not less than 10 years' imprisonment and the maximum sentence is life imprisonment. In the instant case, although there was reason to substitute the charge, we do not find any prejudice occasioned to the appellant in this case by the failure.

19. Further, in this matter, our scrutiny of the charge sheet does not reveal any defect therein. The fact that the appellant was charged with defilement and not incest does not render the charge sheet defective. We are cognizant that a given set of facts may disclose more than one offence; in such cases, an accused person has no right to choose which offence he should be charged with. A charge sheet does not become defective merely because the prosecution has preffered to charge a person with one offence instead of another offence which is disclosed by the same set of facts.

20. In this appeal it has been urged that the sentence of 20 years meted upon the appellant is excessiveness and harsh. We have considered this ground. An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration. (See **Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.)**

21. In this matter, there is nothing on record to show the trial court erred in the exercise of its discretion in meting to the appellant the 20-year term of imprisonment. There is nothing on record to show that the learned judge erred in upholding the sentence.

22. We are aware of the decisions of this Court in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** to the effect that mandatory minimum sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case. We are also cognizant of the dicta by the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015**.

23. However, taking into account the specific circumstances of this case particularly the filial relationship between the complainant and the appellant, we see no reason to interfere with the twenty-year term of imprisonment meted on the appellant. Accordingly**,** the appellant's submission alleging excessive and harsh sentence meted to him has no merit.

24. The upshot is this appeal has no merit and is hereby dismissed.

Dated and delivered at Eldoret this 6th day of June, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.